

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1291

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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-against-
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CHRISTOPHER JOHNSON,
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Defendant-Appellant.
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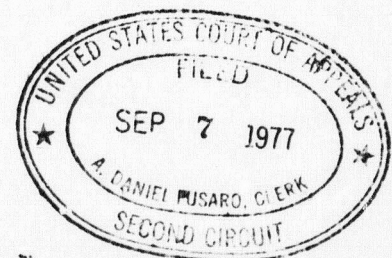
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Docket No. 77-1291

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BRIEF FOR APPELLANT
CHRISTOPHER JOHNSON
=====

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
Christopher Johnson
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.



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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

1. Whether the Courts refusal to permit counsel to cross examination about the way and why Medrano became an informer was violative of the Sixth Amendment?
2. Whether the instruction on evaluating appellant's credibility was error under the circumstances here.
3. Whether the judges refusal to instruct the jurors that there could be no conspiracy with an informer was error.

STATEMENT PURSUANT TO RULE 28 (a) (3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Henry F. Werker) rendered on June 16, 1977, convicting appellant Christopher Johnson after trial before a jury of conspiracy to distribute and to possess with intent to distribute heroin, and the substantive count of distribution of heroin on August 19, 1976.* Appellant was sentenced to five years imprisonment on each count to run concurrently to be followed by three years special parole on each count to run concurrently.

The Legal Aid Society, Federal Defender Services Unit was continued as counsel on appeal.

Statement of Facts

A. The Government's case

The government's case was presented through the testimony of informer Carlos Medrano, undercover DEA agent Michael Pavlick, and several agents who were keeping surveillance. The testimony of the government witnesses establishes that informer Carlos Medrano was a key participant in the transfer

*A third count of the indictment was dismissed at the end of the government's case for failure of proof.

of drugs that took place on August 19, 1976, in which appellant was asserted to have been a participant. Medrano had a long history of drug-related crimes (24-29*) and in 1970 had pleaded guilty to burglary committed in an effort to sustain his then eight year-old heroin habit (24).

In cross-examination of both Medrano and Pavlick, defense counsel attempted to elicit information about Medrano's relationship with Pavlick and the government. However, objection by the prosecutor and adverse rulings by the district judge precluded this. Thus, when cross-examining Medrano, defense counsel inquired about Medrano's employment. The Assistant United States Attorney objected, stating that the name of the employer would reveal the location of the employment (49) and that was "something the government wishes for this case and others not to reveal" (50). The Assistant United States Attorney claimed "there are also other people involved in it that the government needs to protect beside Mr. Medrano but who are related to Mr. Medrano" (50). To this the defense counsel responded

MR. JOY: You know, the Government is putting on a witness and I don't think that they can shield him from all questions regarding his background.

*Numerals are references to pages of the trial transcript.

I think it is relevant to his credibility and I don't think -- I have no wish to expose him to anything that he is not already exposed to, but I think I can't be restricted on cross-examination because of some fear that the Government may not want anyone to know where he is.

(49).

The district judge believed that problems caused by limiting cross-examination were for the defense and not the prosecution (50). He permitted the defense to ask what employment the informer had, but not its location (50). Defense counsel agreed to this ruling (50).

Counsel was able to elicit from Medrano that Agent Pavlick recruited him for the purpose of informing and that they first spoke on the telephone (54) at the beginning of August, 1976 (56). Medrano filled out an application in which he said he was involved in the drug scene. He was not, however, involved in it in August of 1976 (55).

According to Medrano, Agent Pavlick had asked Medrano to come to his office. Medrano appeared there on August 17, 1976 (57), when at government expense he was flown to New York (89). At a meeting between them, Medrano and Pavlick discussed all the things that could come up in a drug transaction (62). In a further attempt to examine the origins of the relationship between Pavlick and Medrano, defense counsel asked Medrano:

And you never had any other contact with them at that point [August 17]?

To which Medrano responded "Personally, no" (89).

Defense counsel's cross-examination of Pavlick elicited that he recruited Medrano as an informer, and that he met Medrano on August 13 or 14, 1976 (197). Pavlick said he did not need any credentials from Medrano because Pavlick "knew of him" (201). Later counsel asked Pavlick "you heard about him [Medrano] by reputation...?" Pavlick replied they had a mutual associate (202).

However, any further examination on how or why Medrano came to cooperate with the DEA was foreclosed after the Assistant United States Attorney requested a bench conference. The Assistant United States Attorney represented that this mutual associate lived with Medrano in Puerto Rico and that the government was trying to protect this person who had a long standing relationship with Pavlick (202). Defense counsel objected to this interruption of his examination arguing his right of confrontation and stating:

"I have got to be able to find out what this man--"

The judge interrupted him stating: "you are not going to be able to," to which counsel took an exception (203).

The other information which was elicited about Medrano was that the government flew him to New York on two occasions (88). Medrano worked partially to get money (55) and he was paid \$300 a week by the government whenever he was devoting full time to a case (44; 58-59; 199). It was also learned that Pavlick intervened on Medrano's behalf when the latter was arrested by Secret Service Agents in Florida for passing

a counterfeit bill (44-46; 204).

On August 17, 1976, Medrano met James P. Zayas, who was charged as a co-defendant and co-conspirator of appellant (See indictment, B to appellant's separate appendix), but who was not tried with appellant. Medrano had met Zayas in 1967 when they both used drugs (53).

Medrano asked Zayas where he could purchase large amounts of heroin. Zayas replied that he had several people who would be able to get it (30).

Zayas then told Medrano that someone was coming to talk with Medrano. Fifteen or twenty minutes later, appellant met with Medrano (31).

Medrano testified that appellant said he could get the drugs and could be more specific about the details on the following day (32). The two agreed to meet the next day (32). Medrano then reported to Pavlick the license plate number of the car in which appellant was driving, from which the agents learned that appellant was the owner and his address (54).

Medrano stayed with Zayas and the next day at about 3:00 or 4:00 P.M. met with appellant (33). Medrano testified that appellant said he could get the desired heroin, either brown or white (34), that an eighth of the brown would cost \$9,000 and that the white, of better quality, would cost \$11,000 (35).

Medrano told appellant they could meet at Zayas' house at noon the next day, August 19, for the transaction (34).

At 1:30 P.M. the next day Medrano again met with appellant at Zayas' house (36). According to Medrano they agreed to make the transfer at Grant's Tomb (36). Medrano then met Pavlick in the street and reported that appellant wanted the \$11,000 "up front." Pavlick left the area to confer with his supervisor and got approval to pay the money in advance of receiving the drugs (142-3). Pavlick returned to the street in front of the house; Medrano got into the car with Pavlick; they talked; and Pavlick searched Medrano. Medrano left the car and then returned with Zayas (144). Subsequently Zayas remained with Pavlick as a hostage or collateral and they drove to Grant's Tomb. Medrano joined appellant and they also drove to Grant's Tomb (36-37; 66-69; 144-145).

After arriving there, Medrano left appellant's car and obtained the money from Pavlick (38, 148). Medrano and appellant drove away and to a building on 1st Avenue. Appellant left the car and walked away (39). About 15 minutes later appellant returned carrying a newspaper which contained a sealed plastic container with heroin. Medrano paid appellant; appellant left the car taking the money with him; appellant returned shortly; they returned to Grant's tomb; Medrano reached under the seat for a bag (151) and put it in a paper given to him by appellant (151); Medrano got out of the car and handed the package to Pavlick as appellant drove a short distance away (41) and finally drove off (42, 78). Pavlick then drove off

leaving Zayas and Medrano.* Pavlick tested the contents of the bag and it was heroin (155).

Medrano saw appellant and Zayas a few days later and Medrano complained about the quality of the heroin. Appellant said he would try to make up the difference (43). Later Zayas gave Medrano \$500 of the \$1000 appellant had given him (44).

On September 3, 1976 Zayas, in a meeting with Pavlick, apologized for the defective purity of the package delivered on August 19 and said he would try to contact Johnson to rectify the defect (157).

On October 17, 1976, a second sale to Pavlick was planned with Zayas (158) for \$17,000 (159) but the transaction never took place because Pavlick refused to put the money up front.

According to Pavlick, when appellant was arrested he admitted taking Jimmy to Grant's Tomb and going to Pleasant Avenue to get the heroin (194).

B. The defense

Appellant testified on his own behalf that he accompanied Medrano, whom he met at his club, to do him a favor without knowledge of the transfer of drugs.

* DEA Agent Larry Burstein maintained surveillance over the activities of Agent Pavlick on August 19. Burstein's testimony about Pavlick's conduct basically corroborates that of Pavlick and Medrano. However, he heard none of the conversations.

C. The charge

In the colloquy on the requests to charge, the district judge said he would charge on the interest of the defendant (320). The following then took place:

MR. JOY: Will you also charge in connection with the interest, the interest of anybody else in this case as the jury may find it? I mean, if they find the Drug Enforcement or the informer, it isn't just the defendant, it is any witness --

THE COURT: I charge that normally in the course of the boiler plate, Mr. Joy.

MR. JOY: The problem in singling out the defendant is --

THE COURT: I think we have to single out the defendant because the defendant is the person who has the most interest in the outcome of a trial.

MR. JOY: Well, he obviously has a very direct one, there is no denying that.

THE COURT: Exactly.

I will not, not single him out, that is for sure.

MR. JOY: Well, could you at least put the part of the boiler plate that regards the other witnesses at least alongside when you single the defendant out?

THE COURT: I will see whether I can work that out for you, but I am not sure that I will.

You may have an exception on the record if you like.

(320-1)

In its charge* the court gave the following instruction on informers:

*The full charge is "C" to appellant's separate appendix.

There has been testimony from and with respect to the use of a person sometimes referred to as "an informant" or "informer."

The services of informants are availed of by the Government agents at times to obtain introductions to persons suspected of violating the law. There are certain types of crime where, without the use of informants, detection would be extremely difficult. Frequently the use of informants is necessary to get leads for introductions to persons allegedly engaged in illegal activities or otherwise to aid enforcement officers.

(388-9)

On the credibility of witnesses generally, the court charged:

Now, in performing your function, one of the most important things you have to do is to pass upon the credibility, that is, the believability of the various witnesses who have appeared before you.

This passing on the credibility of each of the witnesses, there are certain considerations you may well have in mind. One of these is the appearance which the witness made when he was on the stand.

You would try to size him up. Did he appear to be telling the truth? Did he appear to be honest? Did he appear to be intelligent? Did he appear to be a person who would be likely to have remembered it accurately and who is capable of reporting it to you accurately?

Another question for you to have in mind regarding each witness is whether the story he has told you is plausible. Does it ring true, or are there inconsistencies in it? How does it fit in with the other evidence in the case which you do believe and other facts you find to have existed? Does it jibe with that evidence and those facts? In short, does the testimony which was given by the particular witness whose credibility you are considering seem to you to be plausible?

Another question you may well ask yourself in passing on the credibility of any witness is whether that witness has any bias or interest in the outcome of the case, and if so whether he has permitted that bias or interest to color his testimony. It, of course, does not follow simply from the fact that a witness does not have a bias or does have an interest in the outcome of the case that his testimony is to be disbelieved.

(392-3)

On evaluating the appellant's testimony, the court stated:

The law permits a defendant at his own request to testify on his own behalf. The testimony of the defendant is before you. You must determine how credible it is. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony.

You are instructed that interest creates a motive for false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony.

However, I want to say this with equal force to you; it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, the defendant's interest has affected or colored his testimony.

(393-394)

D. Jury Deliberations

During the course of the deliberations, the jury requested a copy of the indictment (court exhibit 1), the definition of

entrapment (court exhibit 4), a reading of Pavlick's testimony about the return of appellant and Medrano with the heroin and the actions he saw in appellant's car (court exhibit 7), and the legal definition of possession with intent to distribute (court exhibit 8). In light of these requests from the jury, defense counsel renewed a request made right before the jury deliberations began that the jury be told that appellant could not conspire with or aid and abet Medrano (400, 411).

The judge refused:

I would not grant that request. I think they have the indictment. They are aware of who is being accused of being a co-conspirator with Mr. Johnson (411).

The jurors returned a verdict of guilty on two counts before them.

ARGUMENT

POINT I

IT WAS ERROR FOR THE DISTRICT
JUDGE TO LIMIT THE DEFENSE
CROSS-EXAMINATION OF THE IN-
FORMER ON THE QUESTION OF
BIAS AND MOTIVATION.

Defense counsel sought to examine both Carlos Medrano, the government informer who played a vital role in the transaction and was a very important prosecution witness, and DEA Agent Michael Pavlick about how and why Medrano made his initial contacts with Pavlick and about Medrano's motivation for becoming a government informer. The prosecutor objected to counsel's inquiries about where Medrano lived and worked and about the origins of his contact with Pavlick. Indeed at the bench colloquies which took place during the cross-examination of Pavlick and Medrano, the Assistant United States Attorney stated that her reason for seeking limits on the defense was to prevent interference with efforts to protect Medrano and a third party who lived with Medrano in Puerto Rico and had a long standing association with Pavlick. The district judge accepted the government's position and limited the cross-examination of both Medrano and Pavlick. Counsel objected, asserting his Sixth Amendment right of confrontation. The judge's ruling was error and the judgment must be reversed. Davis v. Alaska, 415 U.S. 308 (1974); Alford v. United States, 282 U.S. 687 (1931); United States v. Harvey, 547 F.2d 720

(2d Cir. 1976); United States v. Masino, 275 F.2d 129 (2d Cir. 1960).

In Alford v. United States, supra, the Supreme Court held that the right of cross-examination had as its permissible purposes, among others,

that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood,...; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, ...; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased....

282 U.S. 691-2.

In Davis v. Alabama, supra, again the Supreme Court stated that the cross-examiner is allowed to discredit the witness by

revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.... We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

415 U.S. at 316.

This Court has similarly held that

When a witness in a criminal case is being questioned as to his possible motives for testifying falsely wide latitude should be allowed in cross-examination. Cross examination is proper when its purpose is to reveal

bias or interest on the part of the witness being examined.

United States v. Masino,
275 F.2d 129, 132
(2d Cir. 1960).

Here, when counsel began to examine Medrano, the government succeeded in restricting the cross-examination as to the location of his place of employment. Counsel then questioned Medrano on his relationship with Pavlick. Despite intensive questioning of Medrano on the way in which he became an informer, counsel learned only that Medrano had telephoned Pavlick and that Pavlick asked Medrano to come to his office. Counsel tried to learn about other contact between Pavlick and Medrano prior to August 17, 1976, but ascertained only that Medrano himself had no other contact with Pavlick.

These responses left gaps in the chronology of Medrano's relationship with the government and in Medrano's background. Confirming the fact that Medrano did not simply make a telephone call to Pavlick was the prosecutor's attempt to keep secret Medrano's employment location and the efforts to protect Medrano and unidentified others. Even without these hints of information lying unrevealed beneath the surface, counsel had the right to inquire about the circumstances (Alford v. United States, supra), but with them counsel's right to cross-examine cannot be disputed.

Medrano, having studiously avoided revealing how he came to make his telephone call to Pavlick, thereby failed to explain the circumstances that suggested his bias, and

possible motivation to testify falsely. United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976). Accordingly, defense counsel was acting properly when he proceeded to examine Pavlick about the origins of the informer relationship.

The law is well settled in this Circuit, as in others, that bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely....

The law of evidence has long recognized that a cross-examiner is not required "to take the answer" of a witness concerning possible bias, but may proffer extrinsic evidence, including the testimony of other witnesses, to prove the facts showing a bias in favor of or against a party.

United States v. Harvey,
supra, 547 F.2d at 722.

Indeed, counsel would have been derelict in his duty had he not pursued the matter with Pavlick. United States v. Moore, 529 F.2d 355 (D.C. Cir. 1976).

On cross-examination Pavlick revealed that he "knew of Medrano" and that they had a mutual associate. Questioning was halted there, however, for the judge accepted the prosecutor's assertion that there was need to protect the third person who lived with Medrano in Puerto Rico and knew Pavlick. Counsel objected, but to no avail.

What defense counsel tried to show here was motivation for Medrano's conduct and testimony. The government's reason for wanting cessation of the cross-examination made it likely there was another person involved who caused Medrano's

actions. Whether Medrano was protecting that person from government prosecution, aiding that person in negotiations with the government, or in any way had an interest in the person which was enhanced by his cooperation with the drug agents was a matter which the defense was entitled to have revealed to the jury.

The government's claim that it wanted the identity of a third person concealed is not a basis for restricting altogether the cross-examination on the question of bias. The prosecution simply had the choice of not objecting to the cross-examination or not calling Medrano as a witness. In Davis v. Alaska, supra, 415 U.S. 308, the Supreme Court made clear the government simply had to make a decision on these issues, and could not both call the witness and restrict cross-examination. In Davis, the issue was whether the sealed juvenile record of a government witness would be disclosed to cross-examine the witness when the state's policy was to preserve the anonymity of the juvenile offender:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected [the juvenile]...from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case.

415 U.S. at 320.

The significance to the defense of the ability to impeach Medrano is demonstrated by examining Medrano's testimony concerning the transfer of heroin. He was the only one who had contact with the supplier and the person who participated in the conversations with the supplier. His testimony was critical on explaining the negotiations and the circumstances.

The jurors request for a definition of entrapment also demonstrates that they were interested in Medrano's conduct. That request, when no entrapment defense was presented, could mean only that the jury was concerned about Medrano's vigorous efforts to complete the transfer and then to set up another. His motivation for doing so was obviously important on this issue. It may well have been the absence in the testimony of any information about motivation that was what was really disturbing the jurors.

The limitation on appellant's cross examination was error and a new trial is warranted.

POINT II

THE JUDGE'S INSTRUCTION TO THE
JURY ON HOW IT WAS TO EVALUATE
THE APPELLANT'S CREDIBILITY WAS
ERROR IN THE CIRCUMSTANCES OF
THIS CASE.

Contrary to the request of defense counsel, the district judge treated in a separate instruction to the jurors the guidelines for evaluating the credibility of appellant's testimony. Not only was the instruction a separate one, but it was one which advised the jurors that the appellant had the greatest interest in the case and therefore strongest motivation of all the witnesses to lie. This very direct and influential charge must be contrasted with the judge's treatment of the interest of Carlos Medrano, the informer and active participant in the alleged sale, and with the instruction on witness credibility generally. When all the instructions are viewed together, the judge's charge clearly favored the prosecution so as to deny to appellant the opportunity for a fair evaluation by the jurors of his credibility and that of the other witnesses in the case.

Defense counsel properly recognized that Medrano not only played a major role in the transaction but was a very important government witness. In an effort to establish his motivation for becoming a government informer and witness, counsel attempted to examine Medrano about how and why he contacted the DEA and about his prior relationship with DEA

Agent Pavlick. The only information which counsel was able to elicit from Medrano was that Medrano had spoken to Pavlick on the telephone from a place outside of New York City, that the government paid his air fare to New York, and that on August 17, the very day of his arrival in New York, Medrano was making contacts for a drug purchase. On examination by the defense, Pavlick testified only that he knew Medrano by reputation. When counsel tried to elicit a more complete chronology with greater detail to fill in the obvious omissions in testimony, the Assistant United States Attorney objected and asked for a bench conference. She sought to preclude any testimony about the person mutually known to Medrano and Pavlick who apparently caused Medrano's cooperation. This person lived with Medrano and had a long relationship with Pavlick. Since the judge sustained the government's position over counsel's objection, the record does not reveal how significant this person was to Medrano, or what would have occurred to this person if Medrano had not cooperated, or why Medrano would be affected by this unknown person. These were pieces of information the jury never learned and which were certainly significant in their evaluations of Medrano's believability.

Despite the limitation on defense counsel's ability to show the interest of this important government witness, the judge used the most extreme of the jury instructions to emphasize the appellant's interest and motivation to lie in his

testimony, First, over a defense request to the contrary the judge charged the jurors about how to evaluate the appellant's testimony in an instruction that was separate and different from that given about other witnesses. Thus, he advised that jurors that the appellant was unique and different.

Not leaving it there however, the judge made the uniqueness and difference a negative factor, emphasizing that appellant was the least credible of witnesses, that his interest was of a character possessed by none other, and that he had a deep personal interest in the result of his case. Not satisfied with describing the interest, the judge went on to state "that interest creates a motive for false testimony, that the greater the interest the stronger is the temptation" to lie.

This instruction emphasized appellant's interest after the defense was improperly precluded from showing the informers interest.

However, the prejudicial impact of this charge was aggravated when it was contrasted with the instructions that were given on to informers and general witness credibility. Of informers, the judge said they were frequently necessary to get leads on persons involved in crime and to aid law enforcement officers. The use of informers having been justified, the judge gave no cautionary instruction about informer testimony (United States v. Swerderski, 539 F.2d

854, 859-60 (2d Cir. 1976*)) and told the jurors not to consider whether they personally approved of use of informers. Thus, the jury was not advised of any of the problems caused by use of informers. See Johnson v. Brewer, 521 F.2d 556, 560 (8th Cir. 1975); United States v. Cimino, 321 F.2d 509, 514 (2d Cir. 1963) (Waterman, J.), cert. denied, 375 U.S. 967 (1964). Further, the jurors could not even apply to Medrano the charge on interest which had been included in the instruction relating to the appellant because the proof of interest had been forbidden.

In the general charge on credibility evaluation the judge outlined the board considerations that go into "sizing up a witness:" his demeanor, his intelligence, his ability to observe, the plausibility of his story. Finally, most matter of factly, the judge simply mentioned that a bias or interest might color a witnesses testimony.

Both the separate charge on determining appellant's credibility and the contents of that charge were error here where the defense was precluded from showing the interest of the informer and the instruction concerning evaluation of other witnesses was merely objective and explanatory.

*This Court said in Swiderski, "This court has said more than once that trial judges should call the jury's attention to their duty to scrutinize the testimony of accomplices and informers." 539 F.2d at 860.

POINT III

THE JUDGE'S FAILURE TO TELL THE JURORS THAT THERE COULD BE NO CONSPIRACY OR AIDING AND ABETTING BETWEEN THE APPELLANT AND THE INFORMER WAS ERROR.

The nature of the questions posed by the jury during their deliberations caused counsel to renew his earlier request for an instruction that joint activity between Medrano and appellant could not constitute a conspiracy. The judge refused the charge, saying that the indictment was clear as to who was alleged to be the co-conspirator. The judge was incorrect both as to this statement about the indictment and as to his ruling on the request.

The indictment in this case charged appellant, Zayas, and others unknown to the grand jury with a conspiracy to possess heroin with intent to distribute. The jury could have believed that Medrano was the person whose identity was unknown to the grand jury and that therefore, he was a co-conspirator. Since the evidence at trial clearly showed Medrano a participant, the uninstructed jury could have concluded that Medrano and appellant acted together without even evaluating the evidence against Zayas or his guilt. Indeed, because Zayas was not on trial before the jury and the jury consequently did not have to decide his guilt or innocence there is no way of knowing that the jury did not in fact decide that Medrano and appellant were co-conspirators.

The jurors' questions did show that they viewed the case as

involving a deal between Medrano and appellant. The questions they asked during deliberations related to conduct between Medrano and appellant with no reference to Zayas. A partial explanation for the question on entrapment is the jurors' belief that the two could have agreed on the deal unless Medrano's conduct precluded that consideration, and since the judge could give no definition of entrapment, the jurors were free to conclude there was such an agreement. The request for the legal definition of possession with intent to distribute further substantiates how the jury viewed the case since under Medrano's testimony both he and appellant had gone to pick up the package to give it to Paylick.

This is a unique case in which no named co-conspirator was tried with appellant and in which the uninformed jury might have improperly concluded there was a conspiracy between appellant and the informer. Since the failure to instruct the jurors as counsel had requested might have produced a verdict premised on an improper theory of guilt (United States v. Leary, 395 U.S. 6, 31-32 (1969); United States v. Rodriguez, 465 F.2d 5 (2d Cir. 1972); see also, United States v. Natelli, 527 F.2d 311 (2d Cir. 1975)) the failure to give the charge was error requiring reversal.



CONCLUSION

For the above-stated reasons, the judgment below should be reversed and a new trial ordered.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
CHRISTOPHER JOHNSON
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

September 7, 1977

COPY RECEIVED
ROBERT B. FISKE JR.
SEP 7 - 1977
U. S. ATTORNEY
NO. 100-101111

